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Mediation

The Go-To Dispute Resolution Mechanism in India!

December 2020



SINGAPORE INTERNATIONAL
MEDIATION CENTRE

Mediation

The Go-To Dispute Resolution Mechanism in India!

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Our reputation is well regarded for handling complex high value transactions and cross border litigation; that prestige extends to engaging and mentoring the start-up community that we passionately support and encourage. We also enjoy global recognition for our research with an ability to anticipate and address challenges from a strategic, legal and tax perspective in an integrated way. In fact, the framework and standards for the Asset Management industry within India was pioneered by us in the early 1990s, and we continue remain respected industry experts.

We are a research based law firm and have just set up a first-of-its kind IOT-driven Blue Sky Thinking & Research Campus named Imaginarium AliGunjan (near Mumbai, India), dedicated to exploring the future of law & society. We are consistently ranked at the top as Asia's most innovative law practice by Financial Times. NDA is renowned for its advanced predictive legal practice and constantly conducts original research into emerging areas of the law such as Blockchain, Artificial Intelligence, Designer Babies, Flying Cars, Autonomous vehicles, IOT, AI & Robotics, Medical Devices, Genetic Engineering amongst others and enjoy high credibility in respect of our independent research and assist number of ministries in their policy and regulatory work.

The safety and security of our client's information and confidentiality is of paramount importance to us. To this end, we are hugely invested in the latest security systems and technology of military grade. We are a socially conscious law firm and do extensive pro-bono and public policy work. We have significant diversity with female employees in the range of about 49% and many in leadership positions.

Accolades

A brief chronicle our firm's global acclaim for its achievements and prowess through the years –

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2020, 2019, 2018
- **Legal500:** Tier 1 for Tax, Investment Funds, Labour & Employment, TMT and Corporate M&A
2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012
- **Chambers and Partners Asia Pacific:** Band 1 for Employment, Lifesciences, Tax and TMT
2020, 2019, 2018, 2017, 2016, 2015
- **IFLR1000:** Tier 1 for Private Equity and Project Development: Telecommunications Networks.
2020, 2019, 2018, 2017, 2014
- **AsiaLaw Asia-Pacific Guide 2020:** Tier 1 (Outstanding) for TMT, Labour & Employment, Private Equity, Regulatory and Tax
- **FT Innovative Lawyers Asia Pacific 2019 Awards:** NDA ranked 2nd in the Most Innovative Law Firm category (Asia-Pacific Headquartered)
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- **Who's Who Legal 2019:**
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Vikram Shroff, HR and Employment Law- Global Thought Leader
Vaibhav Parikh, Data Practices - Thought Leader (India)
Dr. Milind Antani, Pharma & Healthcare – only Indian Lawyer to be recognized for 'Life sciences-Regulatory,' for 5 years consecutively
- **Merger Market 2018:** Fastest growing M&A Law Firm in India
- **Asia Mena Counsel's In-House Community Firms Survey 2018:** The only Indian Firm recognized for Life Sciences
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm"

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Introduction

Mediation has, of late, been recognized as the fastest-growing mode of alternative dispute resolution. It allows parties to relook at mutual interests and come up with innovative solutions through an interactive and facilitative process. Mediation is voluntary and non-binding upon the parties and issues are resolved through negotiation using proper communication techniques. The mediator suggests options but does not compel the parties to attend the mediation or consider the options if they are not interested. Mediation as a concept has not been confined to any specific statutory enactment in India.

Parties are actively considering mediation, for a bunch of reasons, primarily due to costs. There is an understanding that the global economy has been tough on a number of businesses. If one's traditional business counterpart is facing some actual issues, which is reflected in their non-performance of certain contractual obligations, the idea is to work out amicable solutions without spoiling the working relationship. The goal is to ensure that the bridge between the parties does not get burnt and that is a big plus to a business. Despite mediation being extremely useful and an excellent dispute resolution mechanism, the fact that the process of mediation is non-binding and consequently dependent on the volition of the disputing parties, has made it vulnerable to misuse even with the enactment of the below-mentioned amendments to legislations and Rules, it failed to achieve the desired result.

“

Nishith Desai Associates had organized a webinar in association with Singapore International Mediation Centre (SIMC) on April 22, 2020. During the session, the panelists discussed various topics including the evolution and growth of mediation in India, steps taken to promote and encourage mediation as a popular dispute resolution tool, signing of the Singapore Convention on Mediation as well as use of SIMC by parties in India to resolve disputes. Justice Kurian Joseph, Former Judge, Supreme Court of India, also joined the session and shared his insights and experiences as a lawyer and as a judge, on the development of mediation in India.

Justice Kurian set the tone for the session by discussing the basic objective of addressing the grievance and finding solutions to the same. He also mentioned that the use of mediation should be promoted to ensure peaceful co-existence in society. More often than not, battles are fought to satisfy self-esteem of individuals than actually looking at the larger goal. The idea of mediation is rather simple; it is not to win or lose but have a meaningful dialogue and reach a mutual decision to ensure continuity of relationship or amicable disassociation. With these ideas in mind, the session moved forward discussing the origin, concept and development of mediation in India.

”

We would like to thank Justice (Retd.) Joseph Kurian (Supreme Court of India), Chuan Wee Meng CEO, Singapore International Mediation Centre and Vivek Kathpalia- Head, Singapore office for joining us on the panel in the recently held webinar.

1. Mediation: The Indian Perspective

Mediation, as an informal mechanism to resolve disputes, has been prevalent for decades. However, no legal sanctity is granted to settlements arrived at through mediation. There has always been the need to record such a settlement in one form or another to ensure its enforceability. This is usually done by recording it by way of consent decree before the court, as an arbitral award on agreed terms, or as a settlement agreement arrived at in conciliation proceedings. Mediation has been traditionally used in family-oriented disputes. These could be disputes between a husband and a wife or even the traditional joint family dispute i.e. separation of brothers and sisters and their interests across several businesses etc. Of late, there has been a marked increase in using mediation in the sphere of corporate commercial disputes and the experience has been quite positive.

There have been few specific sectors and laws including the Industrial Disputes Act, 1947, newly amended Consumer Protection Act, 2019 as well as the Companies Mediation Rules, 2016 and Pre-Institution Mediation Rules under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 which have incorporated provisions on mediation within the statute providing it is as one of the modes of amicable resolution of disputes. However, the absence of a unified and consolidated legislation in place has led to a lack of seriousness being accorded to this mechanism.

One question that has often confused and haunted the litigants has been the effectiveness and enforceability of a decision mutually reached by parties with the assistance of the mediator. Interestingly in India, resolution of disputes by conciliation has been statutorily recognized under the provisions of the Arbitration and Conciliation Act, 1996 (“Act”) - leading to the inevitable question - why chose mediation over conciliation and what is the difference between the two modes?

While deciding this tricky question, the answer is simple: mediation and conciliation serve two different purposes and primarily depends on the intention of the parties. In mediation parties have the flexibility to choose any mode or mechanism convenient to them to resolve their issues. While in case of conciliation, the conciliator is bound to follow the process given under the Act and plays a pro-active role to resolve disputes.

Over the years, there has been a definite push towards mediation by the government and judiciary. In addition to statutory provisions, the Supreme Court of India in several rulings for the past few decades, upheld the provisions of mediation and general dispute resolution processes.

2. Legislative and Judicial Reforms

The concept of mediation was dealt specifically under Code of Civil Procedure, 1908 (“**Code**”) while amending it in the late nineties, by introduction of Section 89(2)(d), empowering courts to direct settlement of disputes by mediation amongst other means. The constitutionality of the amendments was challenged in the landmark ruling of *Salem Advocates Bar Association v. Union of India*,¹ leading to the formation of the Law Commission to look into the merits of the amendments and also provide means for easy dispensation of justice.

Section 89(2)(d) of the Code contemplated scenarios where the court could refer matters to mediation. If parties agree to the terms of settlement, the mediator would report to the court and the court, after giving notice and hearing the parties, would give ‘effect’ to the compromise and pass a decree in accordance with the terms of settlement accepted by the parties, thereby rendering finality to the situation. This was specifically in the context of court annexed mediation. In case of failure to settle disputes by way of mediation, parties could go back and litigate.

This led to the framing of the draft Civil Procedure -Alternative Dispute Resolution and Mediation Rules 2003 (“**ADR Rules**”). Settlement by mediation meant the process by which a mediator appointed by parties or by the Court resolves the dispute by application of the provisions of the ADR Rules. The mediator would facilitate discussion between parties directly or by communicating with each other through him/her, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options, in an attempt to resolve the dispute. The mediator would always lay emphasis on the parties to take up responsibility for their decisions and implement them. The ADR Rules also provided for detailed guidelines for processes to be followed and the ethics of mediators. This was followed by the Supreme Court establishing Mediation and Conciliation Project Committee (“**MCPC**”) in April 2005 to oversee the effective implementation

of mediation. The objective was to encourage pre-lit mediation and develop mediation as ‘another effective mode of dispute resolution’.

Several high courts across the country, taking the cue from the Law Commission Report and the Rules which framed a comprehensive set of principles for undertaking mediation, enacted rules for mediation. The mediation center set up by the Delhi High Court, in the exercise of its powers drafted the Mediation and Conciliation Rules, 2004 which became effective August 11, 2005; however, the implementation and effectiveness of the same is anyone’s guess! Lack of data and statistics and badly drafted rules have contributed to its failure.

The efforts of the judiciary did not take a back seat and the Supreme Court of India, in *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co. (P) Ltd*,² held that all cases relating to trade, commerce, contracts, consumer disputes and even tortious liability could normally be mediated. Further, the Supreme Court, in the same year, in the case of *Moti Ram (D) Tr. LRs and Anr. Vs. Ashok Kumar and Anr*,³ held that mediation proceedings are confidential taking a step forward in relation to court-directed mediation.

The Supreme Court even referred to the high-profile and extremely sensitive *Ayodhya dispute*⁴ to mediation. Additionally, even for commercial and patent disputes, mediation was resorted to. Examples are several including disputes between the Ambani brothers, disputes over the takeover of South African telecom major MTN and as well as between Hoffman La Roche and Cipla and Merck and Glenmark. The efforts of the judiciary finally saw light at the end of the tunnel in form of amendments to the Commercial Courts Act, 2015, which made mediation mandatory before the institution of a suit. The Ministry of Law and Justice gave mediation the necessary boost when Section 12A was introduced in the Commercial

1. *Salem Advocates Bar Association v. Union of India* (2003) 1 SCC 49

2. *M/s. Afcons Infra. Ltd. & Anr vs M/S Cherian Varkey Constructions (P) Limited & Ors.* (2010) 8 SCC 24

3. Civil Appeal No. 1095 of 2008

4. https://en.wikipedia.org/wiki/Ayodhya_dispute

Courts Act, 2015. Section 12A made pre-institution mediation mandatory.

The benefits of pre-institution mediation are two-fold: in case of a settlement, it is binding and can be enforced as a court order and the time spent in mediation is excluded for the purposes of limitation. In the absence of any specific urgent reliefs being claimed, parties need to exhaust the remedy of pre-institution mediation. The Commercial Courts (Pre-Institution Mediation and Settlement Rules), 2018 (“PIMS”) provides for a detailed procedure on mediation. However, PIMS has made the process of mandatory pre-institution mediation optional.

The process is explained below:

Rule 3(1)

- Party to Dispute makes an application online, by post, or directly to the authority for initiating the process of mediation upon payment of fees (Form 1)



Rule 3(2)

- Authority after receiving the application under Rule 3(1) issues a Notice through post or electronically to the opposite party to appear and give consent to participate in the mediation process on such date not beyond a period of ten days from the date of issue of the said notice (Form 2)



Rule 3(3)

- Authority issues a final notice in case no response is received from the opposite party either by post or by e-mail (Form 2)



Rule 3(4)

- Authority is to treat the mediation process to be a non-starter in case notice issued under Rule 3(3) remains unacknowledged or where the opposite party refuses to participate in the mediation process, accordingly the report is prepared. (Form 3)



Rule 3(5)

- Authority fixes an alternate date in case the opposite party, after receiving the notice under sub-rule (2) or (3) seeks further time for his appearance but not later than ten days from receipt of the request from the opposite party



Rule 3(6)

- Authority is to treat the mediation process to be a non-starter in case the opposite party fails to appear on the date fixed under Rule 3(5) and accordingly prepare a report.

**Rule 3(7) (8)**

- When both the parties to the commercial dispute appear before the Authority and give consent to participate in the mediation process, Authority assigns the commercial dispute to a Mediator and fixes a date for their appearance before the said Mediator. The mediation process is required to be completed within three month from the date of receipt of the application unless such period is extended for further two months, with the consent of both parties.

**Rule 7(1) (viii) and (ix)**

- Mediator reduces the agreement in writing and sign the agreement and get it signed by the parties to the commercial dispute (Form 4)

**Rule 7(1) (viii)**

This is followed by the Mediator providing the settlement agreement, in original, to all the parties to a commercial dispute and forward the same to relevant authorities. In the event, no settlement is arrived at between the parties within the time specified in the sub-section (3) of section 12A of the Act or where the Mediator is of the opinion that the settlement is not possible, the Mediator shall submit a report with detailed reasoning.

**Rule 7(1) (i)**

- Mediator explains the mediation process to the parties at the beginning of the mediation

**Rule 7(1) (ii)**

- Mediator consults with the parties to the commercial dispute before fixing the date and time of each mediation sitting

3. United Nations Convention on International Settlement Agreements Resulting from Mediation

In line with the above developments and steps to encourage and promote mediation, on July 31, 2019, the Indian government approved the signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation (popularly referred to as the “**Singapore Convention**”) by the Republic of India. This landmark decision led to the signing of the Singapore Convention by India on August 07, 2019 and puts the future of mediation and mediated settlements in India on a strong pedestal.

In 2014, the United States of America proposed a multilateral convention on the enforceability of international commercial settlement agreements which was eventually adopted by the United Nations General Assembly on December 20, 2018, leading to the signing of the Singapore Convention. The Singapore Convention aims to provide a global framework for the enforcement of mediated settlement agreements.

Putting it simply, it aims to do for international mediation what the New York Convention did for international arbitration. With its ratification or approval by six states (Fiji, Qatar, Saudi Arabia, Singapore, Belarus and Ecuador as of October 2020) and coming into effect on September 12, 2020, the Singapore Convention is expected to provide impetus to mediation as a method of resolving cross-border commercial disputes. Thus far, 53 countries, including the United States of America and China, have signed the Singapore Convention.⁵ This demonstrates the widespread acceptance of the need for the treaty. The Singapore Convention also aims at promoting investor and business confidence and promote thought leadership in the international dispute resolution system.

5. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en

4. Recent Trends

The Supreme Court early this year, through a unique step, set up a panel to firm up a draft legislation to give legal sanctity to disputes settled through mediation. The panel would recommend a code of conduct for mediators focusing on confidentiality, the voluntary nature of the process, neutrality, avoiding conflicts of interest, the enforceability of settlement, etc. Several governmental and non-governmental institutions and agencies set up in India including CAMP Bangalore, FCDR-Chennai, Maadhyam Delhi, retired judges, senior partners of law firms and academicians from leading national and international universities have submitted their recommendations to the Ministry of Law and Justice for a comprehensive Indian mediation legislation. There is an urgent need to have a uniform statute in place and a regulatory framework to govern the proceedings and give judicial recognition to settlements arrived at in such proceedings.

The starting point of dispute resolution in most commercial contracts is the dispute resolution provision in the agreement between the parties. There are enough clauses out there where prior to arbitration, some level of mediation is contemplated. It was rarely followed in spirit because by the time a dispute arises, most parties don't want to talk or resolve disputes – they want to initiate some legal proceedings.

The rolling out of a law dealing with mediation is likely to encourage the adoption of tiered dispute resolution clause, first providing for mediation followed by arbitration. The upside of a dispute quickly resolved by mediation is too alluring to not consider. One can expect the Government to roll out a detailed framework within which mediation in India and mediated settlements will operate. For India, the signing of the Singapore Convention is expected to boost the confidence of investors and also provide a positive signal to foreign investors about India's commitment to adhere to international practice on alternative dispute resolution.

5. Singapore International Mediation Centre (SIMC)

SIMC was officially launched in November 2014 by the Chief Justice of Singapore, Mr. Sundaresh Menon and the Minister for Law, Mr. K. Shanmugam SC. Since then, it has become known in India and internationally as a leading provider of mediation services. In India, SIMC works closely with its partners, CAMP Arbitration and Mediation Practice, and Mediation Mantras. Recently, on April 22, 2020, Nishith Desai Associates conducted a webinar in association with SIMC (mentioned at the beginning of this paper).

SIMC is a not-for-profit organisation that offers professional dispute resolution services tailored to the needs of businesses in Asia and beyond. It maintains a panel of more than 70 international independent mediators, who have extensive experience resolving cross-border disputes and are highly regarded for delivering successful outcomes in complex, high-stakes commercial disputes. Based on the cases it has managed, SIMC has evolved into a highly effective dispute resolution institution for the amicable resolution of disputes, allowing parties to control the process, and save time and costs. To date, the SIMC has registered more than 130 cases, with a success rate of about 70-80 per cent. The value of disputes is worth about SGD 4.1 billion (EUR 2.6 billion), with the sectors covered including aviation, construction, banking and finance, mining, oil and gas, real estate, maritime and IT amongst several others.⁶ India is SIMC's top overseas user.

A key priority for users of international commercial mediation is enforceability of the settlement agreement. To provide for enforceability, SIMC is a designated mediation service provider under the Singapore Mediation Act 2017, which means that its mediated settlement agreements may be recorded as court orders. The Singapore Mediation Act applies if the mediation is wholly or partly conducted in Singapore or the mediation agreement provides that the said act or the law of Singapore is to apply to the mediation. Singapore has also ratified the Singapore Convention on Mediation and passed the Singapore Convention on Mediation Act 2020, which will allow mediated settlement agreements to be enforced under the Convention in Singapore. In addition, SIMC and the Singapore International Arbitration Centre operate an Arbitration-Mediation-Arbitration Protocol, which allows mediated settlement agreements to be recorded as arbitral awards, which can accordingly be enforced worldwide under the New York Convention.

Besides its mediation services, SIMC also conducts mediator training workshops in different jurisdictions. This included the India Specialist Mediator Workshop in May 2019, which was jointly organised by CAMP and SIMC. The 24 participants were of high standing: including disputes lawyers, in-house counsel, corporate trainers, a sitting High Court Judge and a retired Supreme Court Judge. More workshops are planned.

6. Officials statistics published by Singapore International Mediation Centre as updated following the webinar conducted by them along with Nishith Desai Associates on 22 April 2020.

6. Looking forward

India does not currently have a specific law on mediation. With the signing and coming into effect of the Singapore Convention, this statute is on its way! The concept of mediation has always been ingrained in India, so the current developments have been a strong push for mediation. But some level of enforceability is needed to harness the power of mediation. The Singapore Convention will help converge global efforts and speed up the adoption of mediation in commercial disputes, by addressing this issue (of enforceability). This will help drive the adoption of mediation.

Further, this would also add the necessary impetus to the development of the legal professionals to appreciate and adopt the process of mediation, instead of giving it a go by. The need to train sophisticated dispute resolution professionals cannot be overlooked. Each dispute resolution lawyer needs to understand and test, with an open mind, whether the case before him/her is one that can be resolved using mediation and should be part of the strategy itself.

Unlike other traditional dispute resolution mechanisms, a mediation is only as good as the mediator. The job of a mediator in a dispute is a tough one. On day 1, the mediator starts the dialogue with two warring parties – and try and ensure that he/she doesn't get caught in their crossfire. By the end of this journey with the parties, it is likely that he/she will build the bridge and facilitate a commercial settlement.

As mentioned above, SIMC, as part of its initiatives, conducted a two-day specialist mediator course in association with CAMP. It is extremely critical to understand how such courses will impact on the prevailing mindset and practices of dispute resolution. The commercial objective of a client needs to be kept at the forefront. One realizes that it is not just about winning, sometimes salvaging a relationship is more important from a long-term perspective. Mediation is just that – it allows each party to understand and explore all their alternatives, in a safe environment. It allows each party to resolve their differences while understanding that they got a resolution that they are happy with.

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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical eco-system that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com



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